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IN THE

Supreme Court of the United States

October Term, 1965
No. 528

A. J. BUMB, Trustee in Bankruptcy,

Petitioner,

vs.

B. L. SUHL, MARGARET WIERMAN, CURRENCY EXCHANGE and AMERICAN SECURITY CURRENCY, LTD.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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B. L. SUHL, MARGARET WIERMAN, CURRENCY EXCHANGE and AMERICAN SECURITY CURRENCY, LTD.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 28, 1965.

Citation to Opinions Below.

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra,* p. 2, is reported in .... F. 2d ..... The Referee in Bankruptcy did not write an opinion, nor did the District Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 28, 1965. Rehearing was denied on July 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented.

1. Whether the Trustee in Bankruptcy may proceed in summary proceedings to recover back specific sums of money taken by respondents without substantial adverse claim thereto, immediately prior to bankruptcy, and now in respondents' actual possession.

2. Whether the Trustee in Bankruptcy pay proceed in summary proceedings to obtain a determination of *alter ego*, where no substantial adverse defense is asserted.

Statute Involved.

The statutory provision involved is Section 2a(7) of the Bankruptcy Act, 11 U.S.C. Sec. 11a(7). It is printed in Appendix A, *infra*, p. 1.

Statement.

An original proceeding under Section 322 of Chapter XI of the Bankruptcy Act, 11 U.S.C. Section 722, was filed by Security Currency Services, Ltd., a California corporation, engaged in the money order business. The jurisdiction of the Bankruptcy Court was invoked because the case arises under the Bankruptcy Act. No plan of arrangement was confirmed and the Debtor was adjudicated a bankrupt and petitioner appointed as Trustee in Bankruptcy.

The controlling principals of the bankrupt corporation were respondents B. L. Suhl and Margaret Wierman. Respondent American Security Currency, Ltd. was an affiliated corporation wholly owned and controlled by Suhl and Wierman. Suhl also carried on business under the fictitious firm name of respondent Currency Exchange.

Petitioner instituted summary proceedings for an accounting and return of monies taken from the bankrupt on the eve of bankruptcy by the controlling principals of the bankrupt, respondents B. L. Suhl, and Margaret Wierman, and one of their wholly owned corporations, American Security Currency, Ltd. As a separate cause of action, petitioner sought a determination that the bankrupt corporation is merely a shell and a dummy and the *alter ego* of Suhl and Wierman, and for authority to marshal their assets and administer the same to satisfy the obligations of the bankruptcy estate.

The respondents, without denying the allegations of petitioner's application, and without setting up any adverse claims to the monies alleged to have been taken, filed a special appearance and motion to dismiss for lack of summary jurisdiction of the Bankruptcy Court. Over this objection to summary jurisdiction, the bankruptcy court conducted proceedings to determine whether or not (1) monies of the bankrupt were taken by the respondents; (2) whether or not the respondents had any substantial adverse claims to these monies; and (3) whether or not the respondents had any substantial defense to the *alter ego* claim of the Trustee in Bankruptcy. After a trial, in which the respondents were afforded every opportunity to set up a defense, or an adverse claim, the Referee in Bankruptcy found (1) that Suhl, Wierman, Currency Exchange and American Security Currency, Ltd. had taken $455,343.28 of the bankrupt's money, without any right, or claim of right thereto (2) that the separate existence of the bankrupt corporation was a sham in that it was in fact a naked shell and the *alter ego* of Suhl, Wierman and Currency Exchange; and (3) that while respondents were in actual posses-

sion, they set up no substantial adverse claim to the money taken, nor any claim of inability to repay the same and that, therefore, the Trustee in Bankruptcy had constructive possession and the Bankruptcy Court had summary jurisdiction to enter an order for the return of the money. The Referee thereupon entered his order directing the marshalling of the assets of Suhl, Wierman and Currency Exchange under the *alter ego* cause of action to satisfy the claims against the bankruptcy estate, and separately, ordered the return of the $455,-343.28 as against respondents Suhl, Wierman, Currency Exchange and American Security Currency, Ltd.

The Referee's Findings of Fact, Conclusions of Law and Order were made and filed on May 27, 1964. Respondents took a review to the United States District Court, which entered its judgment affirming the Referee in Bankruptcy on September 16, 1964.

Respondents took an appeal to the Court of Appeals for the Ninth Circuit. The Circuit Court, in its judgment of June 28, 1965, reversed the District Court and the Referee in Bankruptcy, and held that the Bankruptcy Court was without summary jurisdiction in the matter.

In its opinion, the Circuit Court made the following important points:

1. "In the present suit, appellants were in actual possession of substantial assets which the trustee in bankruptcy claimed were part of the bankrupt's estate."

2. "The summary proceedings conducted by the Referee certainly may lead one to reasonably conclude that appellants have no substantial defense to the trustee's allegations of fraud."

The existence of the assets in the actual possession of the respondents was recognized, and the Referee's findings of lack of substantial adverse claim was not disturbed.

In this posture, with the Trustee in Bankruptcy having established the amount taken; with no adverse claim being set forth or shown by respondents; with naked, physical possession in the respondents, the Court of Appeals concluded that the doctrine of constructive possession could not apply where the property taken and withheld was money and that, therefore, the Bankruptcy Court was without summary jurisdiction to order its return.

The Court of Appeals further concluded that the petitioner's separate and distinct cause of action to establish *alter ego* and to direct marshalling of the assets was the only method to establish constructive possession, and that the bankruptcy court, despite the decision of this Court in *Sampsell v. Imperial Paper & Color Corporation* (1941), 313 U.S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 could not determine *alter ego* in a summary proceeding, even in the absence of any adverse claim or defense.

The Referee in Bankruptcy and the District Court, in determining that the Bankruptcy Court had summary jurisdiction in this case to pass on the *alter ego* issue, relied on the opinion of this Court in *Sampsell v. Imperial Paper & Color Corporation* (1941), 313 U.S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, and the opinion in *Teasdale v. Robinson* (C.A. 8th 1961), 290 F. 2d 108. The Court of Appeals distinguished Sampsell on the basis that, in this case the corporate shell was in

bankruptcy, with the assets being diverted by the individuals who were not in bankruptcy. It did not mention Teasdale.

The Referee in Bankruptcy and the United States District Court in determining that the Bankruptcy Court had summary jurisdiction to order the return of the money taken without adverse claim thereto, relied on the decision of this Court in *May v. Henderson* (1925), 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 (summary proceedings ordering return of money converted prior to bankruptcy), as well as the decisions in *Rabinovitz v. Oughton* (CCA 3, 1937), 92 F. 2d 297 (summary proceedings ordering return of money converted prior to bankruptcy); *American Mannex Corporation v. Huffstutler* (CA 5th, 1964), 329 F. 2d 449 (summary proceedings ordering return of property or its proceeds converted prior to bankruptcy); and *Teasdale v. Robinson* (CA 8th, 1961), 290 F. 2d 108 (money diverted from ever coming into possession of the bankrupt corporation ordered returned in summary proceedings, along with summary determination of *alter ego*). These authorities were not discussed by the Court of Appeals.

Reasons for Granting the Writ.

1. The Supreme Court has unique supervisory authority over bankruptcy proceedings, and there is no area of the bankruptcy law presently in such a state of flux and confusion as the judge-made law area of equating constructive possession with the lack of substantial adverse claim by a person in actual possession.

Every day, Trustees in Bankruptcy are asserting constructive possession to property, including money,

taken from bankrupt estates by insiders on the eve of bankruptcy without any possible claim of right thereto. Often the bankruptcy estates are completely stripped of funds and assets with which to prosecute lengthy and expensive plenary suits to recover back what is clearly, and without substantial dispute, the bankrupt's assets. Unless the availability of summary proceedings to recover back the bankrupt's property in such cases, is clarified and defined by this Court, the effects of the Court of Appeals' decision will be disastrous to bankruptcy administration in the Ninth Circuit, and in other areas that may choose to follow the restrictive ruling of the Court of Appeals.

It is of vital importance that the Supreme Court assert its position in this area involving the availability of summary proceedings in the absence of substantial adverse claims, so that the law may be clarified and followed by the Circuits uniformally.

2. There is a conflict between the present ruling of the Court of Appeals refusing to allow summary proceedings to determine the existence of *alter ego* in the absence of an adverse claim, and the opinion of this Court in the matter of *Sampsell v. Imperial Paper & Color Corporation, supra.* In the *Sampsell* case, the individual divested himself of his assets, transferred said assets to the *alter ego* corporation. In the present case, the individuals looted the corporation and then threw it into bankruptcy proceedings.

3. There is a conflict between the ruling of the Court of Appeals that the Bankruptcy Court does not have summary jurisdiction to order the return of money held by the respondents without adverse claim thereto in summary proceedings, and the decision of this Court

(overruling the Court of Appeals for the Ninth Circuit) in *May v. Henderson* (1925), 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870. As Justice Stone therein stated at page 118:

> "The findings of the Referee and the evidence leave no doubt that the surrender or abandonment of their bank account to the bank by the assignees and its attempted application by the bank for the payment of its note, was collusive and without any substantial basis of legal right. At most it was a clumsy, ineffectual and fraudulent effort to divert the funds of the bankrupt to the payment of a favored creditor. While it is now settled that the claim of an assignee for the benefit of creditors, of the right to charge in his account expenses incurred or expenditures made prior to the filing of the petition in bankruptcy, in an adverse claim which cannot be adjudicated in a summary proceeding (cases cited), we think the rule cannot be extended to a case such as this, where the claim is merely colorable, and on its face made in bad faith, without any legal justification."

The rule of *May v. Henderson,* being followed in many bankruptcy courts, is now jeopardized within the Ninth Circuit.

3. There is a conflict between the present ruling of the Court of Appeals for the Ninth Circuit and the decisions in three other Circuits. In *Rabinovitz v. Oughton* (CCA 3, 1937), 92 F. 2d 297, the appellant withdrew monies from the bankrupt prior to bankruptcy, which were allowed to be recovered in summary proceedings. In *American Mannex Corporation v. Huff-*

stutler (CA 5th, 1964), 329 F. 2d 449, steel, belonging to the bankrupt, was converted prior to bankruptcy and partially disposed of. Summary proceedings were held to be proper to recover back the steel taken, or its proceeds. In *Teasdale v. Robinson* (CA 8th, 1961), 290 F. 2d 108, monies were diverted from the bankrupt corporation by certain insiders prior to bankruptcy. The money never actually reached the bankrupt corporation and the respondents therein objected to summary jurisdiction and asserted an adverse claim thereto. It was held that the monies could be recovered in summary proceedings and, as the Court stated in clear and unambiguous language at page 115:

> ". . . an ingenuous adverse claim which is a sham and a pretense is not an ingenuous substantial adverse claim which calls for plenary action in a court other than a court of bankruptcy."

Each of these cases, relied upon by the Referee in Bankruptcy and the United States District Court, were called to the attention of the Court of Appeals and were passed over in silence in the opinion of the Court of Appeals for the Ninth Circuit. The law, therefore, appears to be that a cow taken on the eve of bankruputcy by a third party without claim of right may be recovered back in summary proceedings. Money taken without claim of right can be recovered back in summary proceedings in the Third, Fifth and Eighth Circuits, but not in the Ninth Circuit.

4. The questions presented herein are of clear importance in the administration of the Federal Bankruptcy law, because they arise in case after case, and could involve the ability, or inability of a looted estate

to recover back its own property where funds to finance extensive plenary litigation are not available, and where no defense is asserted that would require plenary litigation. It does not appear to be sound public policy, nor is it required by the provisions of the Bankruptcy Act, and the cases interpreting the Act, to require the prosecution of claims such as these in plenary proceedings. This Court should review the case so that Federal and State Courts should not be burdened unnecessarily with suits that could properly and should properly be disposed of in summary proceedings by the Bankruptcy Court.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. BALL,
IRVING SULMEYER,
Attorneys for Petitioner.

August 31, 1965.

APPENDIX A.

Section 2a(7) of the Bankruptcy Act, 11 U.S.C. Sec. 11a(7).

"2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereinafter held, to—

> "(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determined controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

B. L. Suhl, Margaret Wierman, Currency Exchange, and American Security Currency, Limited, Appellants, vs. A. J. Bumb, Receiver in the Matter of Security Currency Services Ltd., a California corporation bankrupt, Appellee. No. 19,737.

[June 28, 1965]

Appeal from the United States District Court for the Southern District of California Central Division.

Before: Chambers, Barnes and Duniway, Circuit Judges; Barnes, Circuit Judge:

Bud Lewis Suhl, Margaret Wierman, and their two wholly-owned corporate entities—Currency Exchange and American Security Currency, Ltd.—have instituted this appeal from the decision of a referee in bankruptcy, affirmed by the district court, which found them indebted to the bankrupt, Security Currency Services, Ltd., in the sum of 455,343.23. Appellants challenge the jurisdiction of the referee to make such a determination in a summary, rather than plenary, proceeding.

The proceedings in question originated under Chapter XI of the Bankruptcy Act. Under Sections 24 and 25 of that Act, we have jurisdiction to entertain this appeal from the final order of the district court.

Pursuant to the provisions of the Bankruptcy Act, the referee in bankruptcy is vested with the power to determine the rights of adverse claimants to the assets

of the bankrupt's estate. In the course of administration of the estate, the adverse claims may be resolved without resort to plenary suits; the bankruptcy court rather may exercise summary jurisdiction to determine the proper distributions. This summary procedure is, of course, necessary to safeguard against cumbersome litigation for all conflicting claims to each asset of the estate. To invoke this summary procedure, however, the assets in question must be in the possession of the bankrupt. The possession requirement has not been applied in an unduly restrictive fashion; generally, if the controversy involves property in the actual or constructive possession of the bankruptcy court, the court may adjudicate summarily all rights and claims pertaining thereto. On the other hand, if the property is within the actual or constructive possession of a third party who asserts a bona fide claim to the property, the bankruptcy court cannot summarily determine the merits of that claim without the consent of the third party; rather, a plenary suit is required.

In the present suit, *appellants were in actual possession of substantial assets* which the trustee in bankruptcy claimed were a part of the bankrupt's estate. It was the trustee's contention, agreed in by the referee and district court, that these assets were in the *constructive possession* of the bankrupt corporation. It was also contended by the trustee, and accepted by the referee and district court, that the merits of appellants' adverse claims to these assets could be evaluated in the exercise of the bankruptcy court's summary jurisdiction because the adverse claims were colorable, not bona fide. Appellants argue that this exercise of summary jurisdiction exceeded the powers of the bankruptcy

court, and they attack the findings of the referee which justified this exercise of jurisdiction.

The extraordinary facts of this elaborate matter, to the extent they have been uncovered, are detailed in the referee's findings. An extract of these complex facts is contained in the "Certificate on Review from Referee's Order," and reads as follows:

> "Margaret Wierman is the mother of B. L. Suhl. At all times since at least 1959, B. L. Suhl and Margaret Wierman, under a partnership agreement, owned at least 85% and at times 100%, of the capital stock of the debtor corporation. The debtor corporation was engaged in the money order business within the state of California, under state regulation. Sometime in 1959, B. L. Suhl and Margaret Wierman formed American Security Currency, Ltd., to engage in the money order business outside the state of California, and capitalized it for $5,000.00. B. L. Suhl and Margaret Wierman at all times owned 100% of the capital stock of American Security Currency, Ltd. Because of the nature of its business and the amount of its capitalization, American Security Currency, Ltd. had banking problems, including difficulty or inability in maintaining its bank account in a collected position. From 1959 to June, 1961, Margaret Wierman acted as President of Security Currency Services, Ltd. In 1961 B. L. Suhl and Margaret Wierman, using funds of American Security Currency, Ltd., purchased controlling interest in the Frontier Bank, at Covello, California. Mrs. Wierman was installed as President of the Frontier Bank and a Wierman-Suhl nominee, Paul E. Lewis,

was made President of the debtor. At all times, however, B. L. Suhl and Margaret Wierman maintained domination over the debtor corporation. The Frontier Bank and the collective position of the debtor corporation were used by B. L. Suhl and Margaret Wierman to carry the uncollected position of American Security Currency. Finally, under instructions of Suhl and Wierman, the debtor corporation, without the consent of its board of directors, issued a written authorization for the Frontier Bank to charge its (Security Currency Services, Ltd.) trust account for any money orders of American Security Currency, Ltd. In January of 1964, the Frontier Bank purporting to act under said authorization, debited the money order trust account of the debtor corporation for money order shortages in the account of American Security Currency, Ltd., in the amount of $135,730.22 on January 13, 1964, $48,626.46 on January 14, 1964, and $30,990.46 on January 24, 1964. The agency account of the debtor corporation was also charged for shortages of American Security Currency, Ltd. in the sum of $8,283.61. Prior to this, in December of 1963, Suhl and Wierman had already caused to be withdrawn from the trust account of the debtor corporation, funds of the debtor corporation in the amount of $85,-787.00 and caused said funds to be paid over to American Security Currency, Ltd. without any consideration therefor. The books of American Security Currency, Ltd. were not produced, despite the issuance of a subpoena duces tecum therefor, which was served upon the president of American Security Currency, Ltd. to wit: B. L. Suhl, and

its purported secretary, Aaron Blackman. Testimony traced the whereabouts of the books to a messenger service for delivery to B. L. Suhl. B. L. Suhl invoked the provisions of the Fifth Amendment of the United States Constitution when asked as to the whereabouts of the records." (Tr. 45-47.)

On the basis of the above facts, the referee concluded that a unity of ownership and control existed between Suhl and Wierman on the one hand and the debtor corporation on the other. He found "that at all times since 1959, the debtor corporation had been a mere shell and naked framework that Suhl and Wierman used as a mere conduit for the conduct of their personal business property and affairs and that the corporation was used and continued by Suhl and Wierman pursuant to fraudulent plans, scheme and device conceived and operated by Suhl and Wierman, whereby the income, revenue and profits of the debtor corporation were diverted by Suhl and Wierman to Suhl and Wierman and to their wholly owned corporation, American Security Currency, Ltd." (Tr. 47-48.)

The referee concluded that appellants' claim to the assets sought by the trustee was frivolous. In the absence of a bona fide claim to this property, the referee concluded the property was in the constructive possession of the bankruptcy court and that the bankruptcy court could exercise its summary jurisdiction to determine the merits of the adverse claim. Concluding that appellants were the alter egos of the debtor corporation, the referee held that the trustee could administer the assets of the alter egos subject only to the right of Suhl and Wierman to the continued possession of their ex-

empt assets. The referee also summarily concluded that appellants were indebted to the bankrupt in the sum of $455,343.28, and that the trustee was entitled to a turnover order against each of appellants in that amount.

The power of a bankruptcy court to resolve adverse claims concerning the assets of the bankrupt's estate is indeed a power of imposing magnitude. Since it results in depriving adverse claimants of a plenary suit, we must ever be cautious lest we permit its extension to a situation that should not permit summary disposition. Where the property in question is in the actual custody of the bankrupt's estate, summary jurisdiction is clearly authorized. Where the physical property is in the constructive possession of the bankrupt, *e.g.*, where a salesman has a truck laden with the bankrupt's wares, we also have no difficulty in upholding the exercise of summary jurisdiction. When, however, the property in question is in the possession of third parties who purport to hold the property free of any claim of the bankrupt, we must carefully examine whether the expedited summary process is appropriate to the situation. This would seem particularly true in a situation, such as the present, where the property in question is a money claim against third parties rather than a physical asset alleged to be part of the bankrupt's estate. Judicial recognition of these relevant factors is typified by the statements of the circuit court and Supreme Court in *Magnolia Pet. Co. v. Thompson,* 106 F.2d 217 (8th Cir. 1939), *rev'd on other grounds* 309 U.S. 478 (1940):

> "It is now settled that the bankruptcy court has power in a summary proceeding to adjudicate, without consent, controversies concerning the title

to property the physical possession of which is in the actual or constructive possession of the trustee, and with consent of the adverse claimants, the title to property not in the possession of the trustee; but the court is without power to adjudicate adversary claims to the title to property, without consent, not in the actual or constructive possession of the trustee." 106 F.2d at 222.

In the Supreme Court it was said:

"Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy." 309 U.S. at 481.

In the present case, the referee, without resort to a plenary proceeding with its attendant safeguards, found that appellants had fraudulently extracted funds from the bankrupt, and, as a result, appellants would be compelled to turn over substantially all their assets for the administration of the bankrupt court. The referee, by virtue of summary proceeding, found that appellants were the *alter egos* of the bankrupt and that assets to which appellants had ostensible title and actual possession were consequently subject to the administration of the bankruptcy court.

The referee's justification for its summary determination was that appellants had no substantial defense to the trustee's claims and, therefore, appellants' assets were in the constructive possession of the trustee. Appellants reply that they rely on a lack of jurisdiction.

We find that no matter how heinous appellants' acts may have been, appellants are entitled to a plenary proceeding before a bankruptcy court can subject them to its unrestricted jurisdiction. No case cited by appellee extends summary jurisdiction to the lengths suggested here. The summary proceedings conducted by the referee certainly may lead one to reasonably conclude that appellants have no substantial defense to the trustee's allegations of fraud. But *without actual or constructive possession of the property in the hands of the trustee, summary jurisdiction is not authorized,* and adverse claimants must be afforded the right to a plenary independent suit. Unlike the bulk of the cases cited by appellee, this is not an instance of an adverse claimant making a colorable claim to a piece of property which results in a finding of constructive possession in the trustee. This is rather a finding that appellants are the alter egos of the bankrupt and thus subject to the complete control of the bankruptcy court. The distinction between the traditional notion of constructive possession and what is involved here can perhaps best be brought out by the statement of the court in *Matter of Retail Stores Delivery Corp.,* 5 F.Supp. 892, 893 (S.D.N.Y. 1933):

> "Barring cases where the party proceeded against consents, the jurisdiction of the bankruptcy court to take summary action regarding the bankrupt estate rests on possession, actual or constructive, of the property involved. [case] Cases of jurisdiction supported by actual possession are where the property is or was in the physical custody of an officer of the bankruptcy court. [cases] Then there were the cases of constructive possession,

> where the property at petition filed was in possession of the bankrupt, his agent, bailee or other person holding for him, or was in possession of one whose claim, though asserted as adverse, is found on inquiry to be no more than colorably so. [cases]"

The only manner by which the trustee can be deemed in constructive possession of appellants' asserts is by a determination of alter ego, *i.e.*, that the appellants and the bankrupt are pragmatically one and the same. The few instances of alter ego determinations in summary proceedings involve fact situations substantially different from the present. They rather invariably concern situations in which an insolvent individual has conveyed his property to a newly-formed corporation with the express view to withdrawing that property from the reach of creditors. These cases stand only for the proposition that a finding that adverse claimant is a legally distinct entity from the bankrupt does not in itself compel the use of a plenary suit. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941).

The *Sampsell* case, *supra,* involved the classic illustration of a bankrupt seeking to utilize a dummy corporation and being prevented from doing so by the judicial use of the alter ego doctrine. The Supreme Court refused to condone such a devious attempt to avoid the summary from the bankrupt's actual or constructive possession:

> "The referee found, *inter alia,* that the transfer of the property to the corporation was not in good faith but was made for the purpose of placing the property beyond the reach of Downey's

creditors and of retaining for Downey and his family all of the beneficial interest therein; that the stock was issued in satisfaction of Downey's claim against the corporation, when Downey was hopelessly insolvent, to prevent Downey's creditors from reaching the assets so transferred; that the corporation was 'nothing but a sham and a cloak' devised by Downey 'for the purpose of preserving and conserving his assets' for the benefit of himself and his family; and that the corporation was formed for the purpose of hindering, delaying and defrauding his creditors. The referee accordingly ordered that the property of the corporation was property of the bankrupt estate and that it be administered for the benefit of the creditors of the estate." 313 U.S. at 216, 217.

"Mere legal paraphernalia will not suffice to transform into a substantial adverse claimant a corporation whose affairs are so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket. Whatever the full reach of that rule may be, it is clear that a family corporation's adverse claim is merely colorable where, as in this case, the corporation is formed in order to continue the bankrupt's business, where the bankrupt remains in control, and where the effect of the transfer is to hinder, delay or defraud his creditors." *Id.* at 218.

The present case presents a situation not analogous to what transpired in *Sampsell.* We have here an order that ***all the assets*** of certain ***individuals*** and their wholly-owned corporate entities be administered as the

assets of the debtor corporation. This order would create a precedent for the administration by the bankruptcy court of all the assets of an individual or individuals upon the *summary* determination that that individual or individuals had perpetrated a fraud against the bankrupt. It would no longer be necessary to justify summary jurisdiction by proof that specific assets were in the actual or constructive possession of the bankrupt. Rather, a summary determination of fraud would subject all of an individual's assets to the bankruptcy court's summary jurisdiction. This abrogation of an individual's right to a plenary proceeding we cannot accept.

As stated in appellants' brief (pp. 18-19):

> "The fact that the relationship between an individual and the corporation is such that he may be liable for the obligations of the corporation does not mean that the individual's assets are those of the corporation, or that he 'is' the Corporation and is a bankrupt along with the corporation."

We find, therefore, that this was not a proper occasion for the use of summary jurisdiction. In the absence of property of the debtor in the actual or constructive possession of the court, no basis for summary jurisdiction is provided. A tortious conversion of funds, as alleged here, can only be established in a plenary suit. A summary proceeding cannot establish the fact of the conversion and in that manner justify the treatment of the converter's assets as part of the bankrupt's estate, and, in turn, justify the court's administration of the converter's assets. To sustain such an approach would result in a sacrifice of one's right to a full-dress trial to refute allegations of tortious behavior.

The order of the referee, affirmed by the district court, is reversed. Appellants' assets are not to be treated as part of the bankrupt estate until a plenary suit determines the issue. Nothing in this decision is intended to prejudice any future efforts by the trustee to seek a redress of grievances against appellants for their alleged tortious conduct, nor to indicate any opinion that the assets sought to be reached by summary proceedings cannot, or should not, be reached in a proper plenary proceeding, either under an alter ego theory, or otherwise.

Judgment.

United States Court of Appeals, For the Ninth Circuit.

B. L. Suhl, Margaret Wierman, Currency Exchange, and American Security Currency, Ltd., Appellants, vs. A. J. Bumb, Receiver in the Matter of Security Currency Services Ltd., a California corporation bankrupt, Appellee. No. 19,737.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is reversed, with costs in favor of appellants and against appellee.

It is Further Ordered and Adjudged that the appellants recover against the appellee for their costs herein expended, and have execution therefor.

Costs taxed in favor of appellants:

Docket fee, Ct. of Appeals:	$25.00
Reproduction of record:	22.32
	$47.32.

Filed and entered June 28, 1965

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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

A. J. BUMB, Trustee in Bankruptcy,

Petitioner,

vs.

B. L. SUHL, MARGARET WIERMAN, CURRENCY EXCHANGE and AMERICAN SECURITY CURRENCY, LTD.,

Respondents.

Brief for the Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The findings, conclusions of law and order of the Referee appear at R. 28. The order of the District Court appears at R. 70. The District Court did not prepare an opinion. The opinion of the Court of Appeals is as yet unreported and appears at pages 72-84 of the Record.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was entered June 28, 1965. The Petition for Rehearing was denied July 29, 1965. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

Statute Involved.

The statute involved is Section 2a(7) of the Bankruptcy Act, 11 U.S.C. 11a(7).

Procedural Statement.

Because of errors and omissions in Petitioner's statement, we submit the following summary of proceedings.

These proceedings were instituted January 16, 1964, by the filing by the debtor corporation, Security Currency Services, Ltd., of a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. Sec. 701 *et seq.*). A Receiver, A. J. Bumb, was appointed. [R. 2.]

On January 28, 1964, the Receiver filed in the Bankruptcy Court, a petition labelled "Application to Authorize Receiver to Administer Assets of the Debtor's Alter Ego, for Turn Over of Money and for Temporary Restraining Order". [R. 15.] The Petition was directed, so far as here material against American Security Currency Ltd., B. L. Suhl, Margaret Wierman and Currency Exchange, the fictitious name of a business owned and controlled by Suhl and Wierman. In form, the petition set up two causes of action. In the first, the Receiver sought a determination that American Security Currency Ltd., B. L. Suhl, Margaret Wierman, Currency Exchange and the debtor corporation were "all and each of them *alter egos,* one of the other, and that all said entities [were] the *alter egos* of B. L. Suhl and Margaret Wierman". He asked for an order directing him to take into his possession and control and administer as assets of the debtor estate, the assets of Currency Exchange, B. L. Suhl and Margaret Wierman. The Receiver alleged in his second cause of ac-

tion that American Security Currency Ltd., Currency Exchange, B. L. Suhl and Margaret Wierman were indebted to the estate in specified amounts and sought, in the alternative, that these respondents be ordered to account for and turn over to the Receiver monies found to be due and owing. The Receiver also sought a temporary restraining order enjoining the above-named parties from "transferring, disposing, hypothecating or in any manner dealing with their assets pending the hearing on the Receiver's Application".

The respondents filed a special appearance and motion to dismiss, objecting to the jurisdiction of the Bankruptcy Court to proceed summarily as to them. The Referee issued an Order to Show Cause and Temporary Restraining Order pending the determination of the issue of summary jurisdiction. Evidence was presented at a series of hearings, held over a period of time, extending from February 6, 1964 to May 8, 1964, and the temporary restraining order was continued in effect during this time over the protests of appellants. No further pleadings were filed by respondents.

On May 27, 1964, the Referee entered Findings of Fact, Conclusions of Law and a "Judgment". [R. 28.] He overruled the objections to summary jurisdiction and denied the motion to dismiss. He ruled that the debtor corporation was the *alter ego* of Suhl, Wierman and Currency Exchange, that they were the *"alter egos"* of the debtor corporation and that the Receiver was entitled to take into his possession and control and administer as assets of the estate. the assets of Suhl, Wierman and Currency Exchange, subject to the right of Suhl and Wierman to have their exempt assets set aside. He ordered Suhl, Wierman and Currency Exchange to turn over to the Receiver all of their assets,

except the exempt assets. He ruled further that Suhl, Wierman, Currency Exchange and American Security Currency Ltd. were indebted to the debtor estate in the amount of $455,343.28 and directed American to turn over to the Receiver that sum.

In his Findings, the Referee found that Suhl, and Wierman were the *alter ego* of the debtor corporation, that the corporation was the *alter ego* of Suhl and Wierman and that Suhl, Wierman and American Currency Services Ltd. had tortiously diverted funds of the debtor and were joint tort feasors. He further found that Suhl and Wierman had no substantial defense to the allegations that they were the *alter ego* of the debtor and that Suhl, Wierman and American Security Currency Ltd. had "not even a colorable defense" to the claim that they had tortiously diverted funds of the debtor. The Referee found on the basis of these findings that he had summary jurisdiction. (The Referee's Findings are set out in full in Appendix A to this Brief.)

On September 23, 1964, the debtor was adjudged a bankrupt and the Trustee in Bankruptcy was substituted for the Receiver in this action. [R. 56, 67.]

Respondents filed a petition for review by the District Court [R. 40] which affirmed the ruling of the Referee on September 16, 1964. [R. 70.] There was no opinion in the District Court.

Respondents appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court and held that no basis for summary jurisdiction had been established.

The Trustee petitioned for a rehearing in the Court of Appeals, which was denied. He then petitioned this Court for a writ of certiorari.

Nature of the Case.

It has been the Trustee's contention in this case, that if it can be shown that a controlling stockholder of a bankrupt corporation has so used the corporation that he will be regarded as its *alter ego,* the Bankruptcy Court has summary jurisdiction over all his individual assets. The Trustee has also contended that summary jurisdiction extends to a cause of action for a tort against the bankrupt found to be the joint responsibility of the stockholder and another unrelated corporation. The Court of Appeals refused to accept this extension of the doctrine of summary jurisdiction.

This is a case in which the Bankruptcy Court claims to have summary jurisdiction over property in the possession of individuals not parties to the bankruptcy proceedings. Since summary jurisdiction depends upon the Court's possession of the property of the bankrupt, the theory is that if the adverse parties' claim to possession is so lacking in substance as to be merely a "colorable claim", the Bankruptcy Court will be considered in "constructive possession" and entitled to proceed summarily.

Questions Presented.

1. Can the Bankruptcy Court in a summary proceeding determine a bankrupt's cause of action against third parties?

2. Can the Bankruptcy Court exercise summary jurisdiction over the property of individuals not parties to the bankruptcy proceedings on the theory that they are the *alter ego* of the bankrupt and that therefore all their personal assets are to be regarded as the property of the bankrupt?

ARGUMENT.

Petitioner has failed to present any reasons why this Court should issue a Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

The reasons which he urges for granting his petition are without merit. They will be taken up in order.

I.

The Decision of the Court of Appeals Raises No Important Question of Bankruptcy Law in Need of Clarification by This Court.

Petitioner states (Pet. p. 6) that there is "confusion" in the "judge—made law area of equating constructive possession with the lack of substantial adverse claim by a person in actual possession." The confusion, if any, exists solely in his mind or in his distortion of both the facts of this case and the ruling of the Court of Appeals. Certainly there is no confusion in the opinion of the Court of Appeals.

Counsel for the Petitioner has attempted to make it appear that the trustee here was trying to recover from respondents specific sums of money of the bankrupt, that respondents had possession of such monies and that respondents did not assert a substantial claim to the property sought by the trustee. What the trustee was in fact trying to do here was to subject all of the personal assets of respondents to his administration on the theory that respondents had no defense to the corporation's cause of action against them for fraud. These assets were admittedly in their own possession; they asserted title and control; the trustee made no claim that these assets had ever been the property of the bankrupt or that respondents did not assert a substan-

tial claim to them. Counsel for the trustee may be confused as to the difference between the lack of a substantial adverse claim to property of the bankrupt and the lack of a defense to a cause of action, but that the Court of Appeals was not so confused is clear from its language. The Court said [R. 79]:

> "The referee's justification for its summary determination was that appellants had no substantial defense to the trustee's claims and, therefore, appellants' assets were in the constructive possession of the trustee. Appellants reply that they rely on a lack of jurisdiction. We find that no matter how heinous appellants' acts may have been, appellants are entitled to a plenary proceeding before a bankruptcy court can subject them to its unrestricted jurisdiction. No case cited by appellee extends summary jurisdiction to the lengths suggested here. The summary proceedings conducted by the referee certainly may lead one to reasonably conclude that appellants have no substantial defense to the trustee's allegations of fraud. But *without actual or constructive possession of the property in the hands of the trustee, summary jurisdiction is not authorized,* and adverse claimants must be afforded the right to a plenary independent suit. Unlike the bulk of the cases cited by appellee, this is not an instance of an adverse claimant making a colorable claim to a piece of property which results in a finding of constructive possession in the trustee. This is rather a finding that appellants are the alter egos of the bankrupt and thus subject to the complete control of the bankruptcy court."

This statement leaves nothing for this Court to "clarify".

The nature of the doctrine of constructive possession is such that it is hard to see how the denial of its applicability raises any question important enough to justify the issuance of a writ of certiorari. The Court of Appeals for the 8th Circuit has pointed out that the applicable law as to whether summary jurisdiction exists when property is in the possession of adverse parties "is much easier to state than it is to apply, since what may appear to one judge to be a bona fide substantial adverse claim may seen to another to be merely colorable and a pretense". (*Teasdale v. Robinson* (8th Cir. 1961), 290 F. 2d 108, 110). Where there is such room for difference of opinion, there can be no ground for certiorari.

A finding that summary jurisdiction existed in this case would, as the Court pointed out, have deprived respondents of their right to a plenary trial, with "its attendant safeguards", but the decision that the Referee did not have jurisdiction has not deprived Petitioner of anything. It simply determined that he should pursue his claims in a proper forum.

Any expense and delay of which Petitioner might complain are due entirely to his short-sighted insistence on the Bankruptcy Court's jurisdiction in a situation where it clearly does not have jurisdiction.

In spite of Petitioner's statement (Pet. p. 9) that the question presented here arises in "case after case", the Court below pointed out in its opinion [R. 79] that Petitioner was unable to find a single case in which it was even suggested that summary jurisdiction might be extended to the length sought here.

II.

The Decision of the Court of Appeals Is Not in Conflict With Any Decision of the Supreme Court of the United States.

Petitioner contends that there is a conflict between the instant decision and two decisions of this Court. He states that there is a conflict with *Sampsell v. Imperial Paper & Color Corp.* (1923), 313 U.S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, in that the Court of Appeals refused "to allow summary proceedings to determine the existence of *alter ego* in the absence of an adverse claim". (Pet. p. 7.) But the Court of Appeals did here recognize that a determination of *alter ego* could be made in summary proceedings. The important question to that Court was not the existence of *alter ego,* but what property of the *alter ego* was to be subjected to the jurisdiction of the bankruptcy court on the theory that it was in fact the property of the bankrupt.

The Court of Appeals discussed the *Sampell* case at length and pointed out that it involved a transfer of *specific property* from an individual to a newly-formed corporation for the express purpose of withdrawing it from his creditors. The Court stated [R. 81]:

> "The present case presents a situation not analogous to what transpired in *Sampsell.* We have here an order that *all the assets* of certain *individuals* and their wholly-owned corporate entities be administered as the assets of the debtor corporation. This order would create a precedent for the administration by the bankruptcy court of all the assets of an individual or individuals upon the

summary determination that that individual or individuals had perpetrated a fraud against the bankrupt. It would no longer be necessary to justify summary jurisdiction by proof that specific assets were in the actual or constructive possession of the bankrupt. Rather, a summary determination of fraud would subject all of an individual's assets to the bankruptcy court's summary jurisdiction. This abrogation of an individual's right to a plenary proceeding we cannot accept."

Petitioner next purports to find a conflict between the instant decision and that of this Court in *May v. Henderson* (1925), 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870, because (in his language) the Court of Appeals ruled that the Bankruptcy Court "does not have summary jurisdiction to order the return of money held by the respondents without adverse claim thereto in summary proceedings". (Pet. p. 7.) It has already been pointed out that in the instant case respondents did not hold any money of the bankrupt. The trustee is claiming in effect that because respondents may have defrauded the bankrupt, he is entitled to all of their assets, money and everything else. There is absolutely nothing in the *May* case to support this contention.

The *May* case involved an order directing assignees for the benefit of creditors to turn over to the trustee in bankruptcy all property of the debtor in their possession. The assignees had permitted the bank in which they had opened an account for the debtor's estate to charge the account for amounts credited on a note which the debtor owed the bank. The court held that the assignees could be held to account for these

sums, stating (at p. 120) that they rested their decision on "the duty of assignees for the benefit of creditors to account in a summary proceeding for the property which they have dissipated without a colorable claim of right." Obviously, that was not the situation of the instant case. The Court of Appeals here has not, as Petitioner charges, "jeopardized" the rule of the *May* case, whatever that rule may be.

III.

The Decision of the Court of Appeals for the Ninth Circuit Is Not in Conflict With the Decision of Any Other Circuits.

Petitioner contends that there is a conflict between the decision of the Court of Appeals for the Ninth Circuit in this case and three decisions in other circuits. Each of these cases involved a demand in summary proceedings for the return of *specific property in the possession of a third party.* None involved an attempt by a Trustee to subject all of the assets of a third party to administration as a part of the bankrupt's estate or to assert a cause of action for debt or conversion. In *Rabinovitz v. Oughton* (3rd Cir. 1937), 92 F. 2d 297, the controlling stockholder of the bankrupt corporation had, immediately preceding bakruptcy, taken cash, merchandise and accounts receivable from the corporation. An order directing him to account for and return the cash and the value of the property taken was held proper. There was no discussion of *alter ego* and no effort to reach any assets other than those which had been *transferred* from the bankrupt.

American Mannix Corporation v. Huffstutler (5th Cir. 1964), 329 F. 2d 449, upheld the propriety of an or-

der in summary proceedings directing the return of steel, found to belong to the bankrupt. There was no question of *alter ego* in the case.

In *Teasdale v. Robinson* (8th Cir. 1961), 290 F. 2d 108, the Court treated the complicated dealings of the controlling stockholders of the bankrupt corporation as in essence the sale of the good will of the corporation. It was accepted that they had possession of the proceeds and could be ordered to return them to the Trustee in Bankruptcy.

It is impossible to see how there is any conflict between these cases and the instant case.

IV.

The Decision Sought to Be Reviewed Is Correct.

In its opinion, the Court of Appeals for the Ninth Circuit has correctly stated and applied the established rules relating to summary jurisdiction and constructive possession.

The Court made it quite clear that its conclusion that the bankruptcy court did not have summary jurisdiction rested upon the ground that respondents did not have possession of property of the bankrupt. This was not a case where specific property of the bankrupt, whether money or anything else, could be traced to respondents. The Court, therefore, quite properly concluded:

> "As stated in appellants' brief (pp. 18-19):
>
> 'The fact that the relationship between an individual and the corporation is such that he may be liable for the obligations of the corporation does not mean that the individual's assets

> are those of the corporation, or that he 'is' the Corporation and is a bankrupt along with the corporation.'
>
> We find, therefore, that this was not a proper occasion for the use of summary jurisdiction. In the absence of property of the debtor in the actual or constructive possession of the court, no basis for summary jurisdiction is provided. A tortious conversion of funds, as alleged here, can only be established in a plenary suit. A summary proceeding cannot establish the fact of the conversion and in that manner justify the treatment of the converter's assets as part of the bankrupt's estate, and, in turn, justify the court's administration of the converter's assets. To sustain such an approach would result in a sacrifice of one's right to a full-dress trial to refute allegations of tortious behavior."

In addition to the grounds stated in the Court's opinion for reversing the order of the Referee, other reasons for reversal were urged in the brief filed by Respondents in the Court of Appeals.

They are briefly outlined here:

1. The hearing before the Referee was initiated only with the question of jurisdiction under discussion. The Referee should have made a determination of that question before entering a judgment. It was error to determine the merits without having decided the jurisdictional question.

2. The petition filed by the Receiver with the Referee asked for relief in the alternative—for a determination of *alter ego* and an order directing the Re-

ceiver to administer the assets of the *alter ego or* in the alternative for an order directing the turnover of a specific sum of money. The Referee gave more than the relief sought by granting both requests. This was erroneous.

Conclusion.

The petition for a writ of certiorari should be denied. Petitioner has misstated the questions presented and the ruling of the Court of Appeals in an effort to induce this court to undertake review of a decision which, in addition to being correct on the merits,

(1) is not in conflict with the decisions of any other Circuits;

(2) does not raise any important question of Federal law;

(3) is not in conflict with any decisions of this Court; and

(4) has in no way departed from the accepted and usual course of judicial proceeding.

In fact, any result other than that reached by the Court of Appeals would, as the Court stated in its opinion, "result in the sacrifice of one's right to a full-dress trial to refute allegations of tortious conduct."

Respectfully submitted,

MARTIN GENDEL,
WILLIAM J. TIERNAN,
VIRGINIA FABIAN,
Attorneys for Respondents.

APPENDIX A.

Findings of Fact and Conclusions of Law re Alter Ego and Turnover Against American Security Currency Ltd., Currency Exchange, B. L. Suhl and Margaret Wierman.

A. J. Bumb Receiver herein filed his application to authorize the Receiver to administer the assets of the Debtor's alter ego, for turnover and for temporary restraining order. The respondents, American Security Currency Ltd., Currency Exchange, B. L. Suhl and Margaret Wierman, were duly served with said application and the order to show cause and temporary restraining order of this Court issued thereon. Said respondents filed their special appearance and motion to dismiss, on the ground that this Court lacked summary jurisdiction to hear and adjudicate the matter. The matter came on for hearing before the undersigned. James E. Moriarty, Referee in Bankruptcy on February 6, 1964. The Receiver appeared by and through his counsel Sulmeyer and Kupetz, by Irving Sulmeyer. The above-named respondents appeared through their counsel Gerald L. Romanik. The motion to dismiss the application and order to show cause was denied pending consideration of the matter and the temporary restraining order was continued pending determination of the issue of jurisdiction. Evidence, both written and oral, was presented to the Court at hearings herein, continued from time to time, until May 8, 1964, when the parties concluded their presentation of evidence and final argument. Now, the Court having considered all of the evidence, arguments, pleadings and memoranda of points and authorities submitted by the parties, and being fully

advised in the premises, and good cause appearing therefor does make its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The Debtor corporation filed its voluntary proceedings for an arrangement under the provisions of §332 of Chapter XI of the Bankruptcy Act on January 16, 1964. A. J. Bumb is the duly appointed, qualified and acting Receiver in these arrangement proceedings.

2. American Security Currency Ltd. is a corporation, organized and existing under and by virtue of the laws of the State of Arizona.

3. At all times since 1959, B. L. Suhl and Margaret Wierman, mother of B. L. Suhl, owned between 100% and 85% of the capital stock of the Debtor corporation, and 100% of the capital stock of American Security Currency Ltd.

4. Currency Exchange is a fictitious firm name of a business owned and solely controlled by B. L. Suhl and Margaret Wierman.

5. Now and at all times since 1959, B. L. Suhl and Margaret Wierman dominated, influenced and controlled the Debtor corporation.

6. Now and at all times since 1959 there existed a unity of ownership and control between B. L. Suhl and Margaret Wierman on the one hand and the Debtor corporation on the other, and the individuality and separateness of said individuals, B. L. Suhl and Margaret Wierman, and the Debtor corporation, does not and has not existed within said time, and despite knowledge of this fact, the Debtor corporation and its officers and

directors have acquiesced in and agreed and consented to and ratified such conduct and control by B. L. Suhl and Margaret Wierman, and are and at all times mentioned herein, have been completely subject to the control of B. L. Suhl and Margaret Wierman.

7. Now and at all times since 1959, the Debtor corporation has been a mere shell and naked framework, which B. L. Suhl and Margaret Wierman have used as a mere conduit for the conduct of their personal business, property and affairs.

8. At all times since 1959, the Debtor corporation was being used and continued by B. L. Suhl and Margaret Wierman, pursuant to a fraudulent plan, scheme, and device conceived and operated by B. L. Suhl and Margaret Wierman, whereby the income, revenue and profits of the Debtor corporation were diverted by B. L. Suhl and Margaret Wierman to B. L. Suhl and Margaret Wierman and to their wholly owned corporation, American Security Currency Ltd.

9. That at all times since 1959, the Debtor corporation was fraudulently used by B. L. Suhl and Margaret Wierman as a source of funds for the conduct of the affairs of their personal and business endeavours.

10. In July and August of 1963, B. L. Suhl and Margaret Wierman caused the Debtor corporation to purportedly authorize the Frontier Bank, Covelo, California, to charge the money orders of American Security Currency Ltd. against the trust account of The Security Currency Services, Ltd. In January of 1964, the Frontier Bank, purporting to act under said authorization, debited the money order trust account of the Debtor corporation for the money orders and shortages

in the account of American Security Currency Ltd., as follows:

January 13, 1964,	$135,730.22
January 14, 1964,	46,626.46
January 24, 1964,	30,990.46

In addition, the agency account of the Debtor corporation at the Frontier Bank was similarly debited by the Frontier Bank for the money orders and shortages of American Security Currency Ltd. on January 24, 1964 in the amount of $8,283.61.

The Frontier Bank thus charged the trust and agency funds of the Debtor corporation for the obligations of American Security Currency Ltd. in the total sum of $221,630.78.

11. That at all times from August, 1961 to January 8, 1964, B. L. Suhl and Margaret Wierman owned a majority of the capital stock of the Frontier Bank. That at all times from August, 1961 through February of 1964 (after the filing of the Chapter XI proceedings herein), Margaret Wierman was the President of the Frontier Bank and in charge of its operations.

12. In December of 1963, B. L. Suhl and Margarent Wierman caused to be withdrawn from the money order trust account of the Debtor corporation, funds of the Debtor corporation in the amount of $85,787.00 and caused said funds to be paid over to American Security Currency Ltd., without any consideration therefor.

13. In December of 1963, B. L. Suhl and Margaret Wierman caused checks due and payable to the

Debtor corporation in the amount of $150,365.00 to be endorsed over to American Security Currency Ltd., without any consideration therefor. During December of 1963, checks belonging to American Security Currency Ltd. in the amount of $2,439.50 were endorsed over to the Debtor corporation, for a net loss to the Debtor corporation in favour of American Security Currency Ltd. in the amount of $147.925.50.

14. That the actions, and each of them, set forth in Findings numbers 10, 11, 12 and 13 were not duly authorized by the Board of Directors of the Debtor corporation, and were not done for any corporate purpose or benefit, but solely for the benefit of B. L. Suhl, Margaret Wierman and American Security Currency Ltd., and said actions were taken solely as a result of the complete dominion and control of the Debtor corporation's affairs by B. L. Suhl and Margaret Wierman, as set forth in these Findings of Fact.

15. That the recognition of the separate corporate identity of the Debtor, as distinct from that of B. L. Suhl and Margaret Wierman, is a fraud upon the creditors of the Debtor corporation. There is, and at all times since 1959, has been such a unity of interest, ownership and control between B. L. Suhl and Margaret Wierman on the one hand and the Debtor corporation on the other hand, that the individuality and separateness of said individuals and the Debtor corporation has ceased and does not exist. Adherence to the fiction of the separate existence of the Debtor corporation and B. L. Suhl and Margaret Wierman would, under all of the circumstancees of this matter, sanction a fraud upon the creditors herein and promote injustice.

16. Now and at all times since 1962, the Debtor corporation has been under-capitalized for carrying on the business in which it was engaged.

17. The Debtor corporation is unable to meet its debts as they mature and is insolvent. Money order claims approximating $800,000 have been filed in these proceedings.

18. The Debtor corporation is the alter ego of B. L. Suhl, Margaret Wierman, Currency Exchange, and they are the alter egos of the Debtor corporation.

19. That the names, Barry Ralston and John Douglas Sawyer, Jr. are aliases used by B. L. Suhl.

20. Based upon overwhelming evidence, substantially uncontroverted, the Court expressly finds that B. L. Suhl, Margaret Wierman and Currency Exchange have no substantial defense to the Receiver's allegations that they are the alter egos of the Debtor corporation and vice versa. The defense raised herein by B. L. Suhl and Margaret Wierman and Currency Exchange on the issue of alter ego is not substantial in any manner or degree whatsoever, and is merely colorable and a sham.

21. Based upon overwhelming and substantially uncontroverted evidence, the Court expressly finds that B. L. Suhl, Margaret Wierman and Currency Exchange have no substantial defense to the allegations that they caused improper diversions of funds from the Debtor corporation to American Security Currency Ltd. in the sum of $455,343.28. The Court further expressly finds, based upon overwhelming and substantially uncontroverted evidence, that American Security Currency Ltd. has no substantial defense to the allegations that it improperly received funds of the Debtor

corporation in the amount of $455,343.28, and it has no substantial adverse claim thereto. That said diversion of funds is tortious and B. L. Suhl, Margaret Wierman, Currency Exchange and American Security Currency Ltd. are joint tort feasors with respect thereto. The respondents, B. L. Suhl, Margaret Wierman, Currency Exchange and American Security Currency Ltd. have not established even a colorable defense to the Receiver's claim against them for said sum of $455.343.28.

22. Based upon the Court's express Findings of no substantial defense or substantial adverse claims by B. L. Suhl, Margaret Wierman, Currency Exchange or American Security Currency Ltd., the Court finds that it has summary jurisdiction to adjudicate this matter in summary proceedings under the Bankruptcy Act.

23. The past conduct of the respondents has shown that the Receiver requires and is entitled to a permanent injunction against the respondents to comply with the judgment of this Court to the limits of their ability and not to take any action or engage in any conduct to interfere with or obstruct the judgment of this Court.

CONCLUSIONS OF LAW

1. B. L. Suhl, Margaret Wierman and Currency Exchange have no substantial defense to the Receiver's first and second causes of action.

2. American Security Currency Ltd. has no substantial defense to the Receiver's second cause of action.

3. The Court has summary jurisdiction to adjudicate this matter and the issues raised in the Receiver's application in summary proceedings under the Bankruptcy Act.

4. The Debtor corporation is the alter ego of B. L. Suhl, Margaret Wierman and Currency Exchange, and they are the alter egos of the Debtor corporation.

5. A. J. Bumb, the duly appointed, qualified and acting Receiver in these Chapter XI proceedings, is entitled to take into his possession and control and to administer as assets of this estate, the assets of B. L. Suhl, Margaret Wierman and Currency Exchange, subject only to the rights of B. L. Suhl and Margaret Wierman to have set side to them their exempt assets.

6. B. L. Suhl, Margaret Wierman, Currency Exchange and American Security Currency Ltd., and each of them, are indebted to the Debtor corporation in the sum of $455,343.28, and said Receiver, A. J. Bumb, is entitled to a turnover order against them and each of them in said amount.

7. The past conduct of the respondents has shown that the Receiver requires and is entitled to a permanent injunction against the respondents to comply with the judgment of this Court to the limit of their ability and not to take any action or engage in any conduct to interfere with or obstruct the judgment of this Court.

Dated: May 27, 1964.

James J. Moriarity
Referee in Bankruptcy